

**Amirthanayaki Kumarasamy v Lembaga Kelayakan Profesion
Undang-Undang Malaysia (Legal Profession Qualifying
Board Malaysia)**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-01-113
OF 2007
SURIYADI, WAN ADNAN MUHAMAD JJCA AND RAMLY ALI J
13 APRIL 2009

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*Civil Procedure — Judicial review — Application for judicial review commenced
by originating summons — Whether appellant's application ought to be dismissed
solely on grounds that she failed to commence it by way of Form 111A as required
under O 53 r 2 of the Rules of the High Court 1980 — Whether any prejudice
occasioned to any party in the proceedings by reason of wrong mode of application
— Whether Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan
& Kesenian Johor & Ors [2008] 5 MLJ 773 may be distinguished — Rules of
the High Court 1980 O 53 & O 1A*

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The appellant, a law graduate with a Bachelor of Law Degree with third class honours from the Wolverhampton University in the UK had gone on to successfully complete her graduate diploma in the legal practice course at the University of Western Australia. She had then written to the Legal Profession Qualifying Board, Malaysia, the respondent, to enquire as to whether she was a 'qualified person' as defined under the Legal Profession Act 1976 ('the LPA'). The director of the respondent informed the appellant that she was not a qualified person under the LPA. The appellant then appealed in writing to the respondent to re-determine her position in the light of certain fresh supporting documents she had obtained. Both the appellant's letters to the respondent regarding her position went unanswered. After repeated enquiries by the appellant as to her status, the respondent finally responded that it had decided to reject the appellant's application. The appellant then commenced the present action against the respondent. By way of this originating summons application ('the OS') the appellant sought, inter alia, an order that the respondent's decision to reject the appellant's application be set aside; that the appellant be declared a 'qualified person' under s 3 of the LPA; and that the appellant be given leave to attend as a pupil to any person qualified to be her master for a period of nine months under s 12 of the LPA. When the matter came up for hearing before the High Court, the High Court judge dismissed the OS on the grounds that the appellant had initiated the proceedings by way of a wrong process. The trial judge had found that the appellant's application, which was in actual fact for judicial review for

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- A certiorari, ought to have been commenced by way of a Form 111A as required under O 53 of the Rules of the High Court 1980 ('the RHC') and not by way of an OS. He then went on to conclude that since the requirement under O 53 of the RHC was mandatory in nature the failure to comply with it would result in the appellant's application being struck out. This was an
- B appeal by the appellant against that decision. The appellant submitted that her application should not have been dismissed on the grounds that she had initiated the proceedings by way of a wrong process. The respondent maintained that the appellant's application should have been commenced by way of an application for judicial review under O 53 of the RHC. In support
- C the respondent cited the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 (*Ahmad Jefri's* case) in which the Court of Appeal held that it was an abuse of the process of the court to commence the proceedings by way of a writ and statement of claim instead of filing an application for judicial review under
- D O 53 of the RHC. The only issue for determination in the present case was whether the appellant's application ought to be dismissed solely on the grounds that she had failed to commence the application by way of Form 111A as required under O 53 r 2 of the RHC.

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Held, allowing the appeal with costs, subject to the case being sent back to the same High Court to be heard on its merits:

- F (1) From the grounds of judgment it was clear that the appellant's application in the present case was dismissed solely on the grounds that the appellant had failed to commence the application by way of Form 111A as required under O 53 r 2 of the RHC and that the trial judge had not considered the merits of the application. Although the
- G appellant in the present case had commenced the application by way of an OS and not by way of Form 111A as required under O 53 of the RHC, such procedural technical objection should not be allowed to obstruct the process of justice to the deserving. As no prejudice was occasioned to any party in the proceedings, including the court, it was obviously unfair to the appellant who came to court to seek justice and
- H a fair hearing to have her application struck out at this stage without a hearing of the merits of the case. This reasoning was in line with the provisions of O 1A of the RHC which stresses that the court or judge should have regard to the justice of a case (see paras 11–15).
- I (2) In *Ahmad Jefri's* case the appellant commenced the application by way of writ and summons and statement of claim whereas the appellant in the present case commenced her proceedings by way of an OS supported by affidavit evidence. The procedures and affidavit evidence involved in an OS and an application for judicial review are

substantially the same. On this ground the facts in *Ahmad Jefri's* case may be distinguished from the facts of the instant appeal and thus the ruling in that case may not be applicable to the instant appeal (see paras 18 & 19).

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[Bahasa Malaysia summary]

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Perayu, seorang siswazah undang-undang dengan Sarjana Muda Undang-undang kelas ketiga dengan kepujian dari Universiti Wolverhampton di UK telah berjaya menyempurnakan diploma graduannya dalam kursus amalan guaman di University of Western Australia. Ketika itu dia telah menulis kepada Lembaga Kelayakan Profesion Undang-Undang, Malaysia, responden, membuat pertanyaan sama ada dia adalah 'orang yang berkeelayakan' seperti didefinisikan di bawah Akta Profesion Undang-Undang 1976 ('APU'). Pengarah responden memaklumkan perayu yang dia bukan orang yang berkeelayakan di bawah APU. Perayu kemudiannya merayu secara bertulis kepada responden menentukan kembali kedudukannya memandangkan dokumen-dokumen sokongan baru yang diperolehinya. Kedua-dua surat perayu kepada responden mengenai kedudukannya tidak dijawab. Selepas perayu berulang kali bertanya mengenai statusnya, responden akhirnya menjawab bahawa ia telah memutuskan untuk menolak permohonan perayu. Perayu memulakan tindakan ini terhadap responden. Melalui permohonan saman pemula ('SP') ini perayu memohon, antara lain, satu perintah bahawa keputusan responden menolak permohonan perayu diketepikan; bahawa perayu diisytihar sebagai 'orang yang berkeelayakan' di bawah s 3 APU; dan perayu diberi kebenaran bagi memulakan latihan sebagai pelatih dengan mana-mana orang yang layak menjadi pengajar bagi tempoh sembilan bulan di bawah s 12 APU. Apabila perkara ini ditetapkan untuk pendengaran dihadapan Mahkamah Tinggi hakim Mahkamah Tinggi membatalkan SP tersebut atas alasan perayu telah memulakan prosiding dengan cara yang salah. Hakim perbicaraan telah menyatakan bahawa permohonan perayu, yang pada hakikatnya adalah bagi semakan semula kehakiman untuk certiorari, sepatutnya telah dimulakan menerusi Borang 111A seperti yang dikehendaki di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan bukan dengan cara SP. Beliau selanjutnya memutuskan bahawa memandangkan keperluan di bawah A 53 KMT adalah mandatori kegagalan mematuhi mengakibatkan permohonan perayu dibatalkan. Ini adalah satu rayuan oleh perayu terhadap keputusan itu. Perayu menghujahkan permohonannya tidak harus dibatalkan atas alasan dia telah memulakan prosiding dengan cara yang salah. Responden menyatakan yang permohonan perayu seharusnya dimulakan dengan cara permohonan untuk semakan kehakiman di bawah A 53 KMT. Sebagai sokongan responden merujuk kes *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian*

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- A *Johor & Ors* [2008] (kes *Ahmad Jefri*) di mana Mahkamah Rayuan memutuskan bahawa ia adalah satu penyalahgunaan proses mahkamah bagi memulakan prosiding dengan cara writ dan pernyataan tuntutan daripada memfailkan permohonan semakan kehakiman di bawah A 53 KMT.
- B Satu-satunya isu untuk penentuan dalam kes ini adalah sama ada permohonan perayu sepatutnya dibatalkan semata-mata atas alasan dia telah gagal untuk memulakan permohonan dengan cara Borang 111A seperti yang dikehendaki di bawah A 53 k 2 KMT.

C **Diputuskan**, membenarkan rayuan dengan kos, tertakluk kepada kes ini dibicara semula ke Mahkamah Tinggi yang sama untuk didengar pada meritnya:

- D (1) Daripada alasan penghakiman jelas bahawa permohonan perayu dalam kes ini dibatalkan semata-mata atas alasan bahawa perayu gagal untuk memulakan permohonan menerusi Borang 111A seperti yang dikehendaki di bawah A 53 k 2 KMT dan hakim perbicaraan mempertimbangkan merit permohonan ini. Walaupun perayu dalam kes ini memulakan permohonan dengan cara SP dan bukan menerusi Borang 111A seperti yang dikehendaki di bawah A 53 KMT, bantahan teknikal prosedur tidak patut dibenarkan bagi menghalang proses keadilan bagi yang berhak. Memandangkan tiada prejudis telah disebabkan kepada mana-mana pihak dalam prosiding, termasuk mahkamah, ternyata tidak adil bagi perayu yang datang ke mahkamah untuk mendapat keadilan dan satu perbicaraan yang adil mendapati permohonan mereka dibatalkan pada peringkat ini tanpa pendengaran merit kes. Taakulan ini adalah sejajar dengan peruntukan-peruntukan A 1A KMT yang menekankan bahawa mahkamah atau hakim seharusnya mempertimbangkan keadilan sesuatu kes (lihat perenggan 11–15).
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- G (2) Dalam kes *Ahmad Jefri* perayu memulakan permohonan dengan cara writ dan saman dan pernyataan tuntutan manakala perayu dalam kes ini memulakan prosidingnya dengan cara SP yang disokong dengan keterangan afidavit. Prosedur-prosedur dan keterangan afidavit dalam suatu SP dan dalam suatu permohonan untuk semakan kehakiman sebahagian besarnya adalah sama. Atas alasan ini fakta-fakta dalam kes *Ahmad Jefri* boleh dibezakan daripada fakta-fakta rayuan ini dan oleh itu keputusan dalam kes itu tidak boleh digunakan untuk rayuan ini (lihat perenggan 18 & 19).]
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Notes

For cases on application for judicial review commenced by originating summons, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4324–4328.

Cases referred to

Ahmad Jefri Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773; [2008] 6 CLJ 473, CA (distd)

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134, HC (refd)

Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Form 111A

Legal Profession Act 1976 ss 3, 12

Rules of the High Court 1980 O 1A, O 18 r 19(1)(b), (d), O 53, O53 r 2(1)

Christian Chandran Aiyathurai (CC Aiyathurai & Co) for the appellant.

Wong Kian Kheong (Alex Tan Chie Sian with him) (Wong Kian Kheong) for the respondent.

Ramly Ali J:

[1] The present appeal is against the decision of the learned High Court judge on 10 October 2007 dismissing the appellant's amended originating summons on the ground that the appellant by commencing proceedings by way of originating summons, had failed to comply with the provisions of O 53 of the Rules of the High Court 1980.

[2] The events leading to this appeal may be summed up as follows:

- (a) the appellant had on 20 February 1995 obtained her 'bachelor of laws degree with third class honours' from Wolverhampton University, United Kingdom. After that she had undergone the graduate diploma in legal practice course at the University of Western Australia and obtained the relevant certificate on 21 April 1999;
- (b) the appellant first wrote to the respondent (Legal Profession Qualifying Board Malaysia) on 8 September 1999 with regard to the question of whether she was a 'qualified person' as defined under the LPA or otherwise;
- (c) the director of the respondent, one Encik Khalid bin Yusof informed the appellant that she was not a 'qualified person' as defined under the LPA by way of a letter dated 26 October 1999;
- (d) by a letter dated 20 December 1999, the appellant appealed to the respondent to re-determine her position in light of certain fresh supporting documents she has obtained;

- A** (e) on 20 March 2000, the appellant wrote to the respondent:
- (i) demanding a reply from the respondent within 14 days as regard the question of whether she was a ‘qualified person’ as defined under the LPA or otherwise; and
- B** (ii) the appellant informed the respondent that she might go to court to seek a declaration in the event that the respondent should decide that she was not a ‘qualified person’ as defined under the LPA;
- C** (f) the respondent did not reply to either the appellant’s letter date 20 December 1999 or the appellant’s letter dated 20 March 2000;
- (g) the appellant wrote again a letter on 18 October 2005 appealing to the respondent to consider the same question of whether she was a ‘qualified person’ as defined under the LPA;
- D** (h) on 2 March 2006, a meeting was held between the appellant’s husband, Mr E Yawanarajah and Dato’ Noraini Abdul Rahman, the then Director of Examination for the Certificate of Legal Practice as regards the appellant’s status;
- E** (i) on 6 March 2006, the appellant wrote again to the respondent on the same issue and sought a reply from the respondent as regard her status; and
- (j) by a letter dated 7 April 2006, the respondent informed the appellant that the respondent has on 28 March 2006 decided to reject the
- F** appellant’s application.

[3] In the amended OS, the appellant sought the following reliefs against the respondent:

- G** (a) an order that the respondent’s decision dated 28 March 2006 be set aside;
- (b) the appellant be declared a ‘qualified person’ as defined under s 3 of the LPA; and
- H** (c) the appellant be given leave to attend as a pupil to any person qualified to be her master for a period of nine months under s 12 of the LPA.

- I** [4] On 10 October 2007, the High Court judge dismissed the appellant’s amended originating summons on the ground that the appellant, by commencing proceedings by way of originating summons, had failed to comply with the mandatory provisions of O 53 of the Rules of the High Court 1980. Hence the present appeal.

[5] Learned counsel for the appellant argued that the process initiated by the appellant by way of originating summons in the present case is correct and the learned High Court judge should not have dismissed the appellant's application just on the ground that the appellant had initiated the proceedings by way of a wrong process.

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[6] Learned counsel for the respondent on the other hand contended that the appellant's application is in actual fact for judicial review, for certiorari, therefore the process must be way of specific format (Form 111A) under O 53 of the Rules of the High Court 1980, not by way of originating summons.

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[7] The learned High Court judge in his judgment appears to have agreed with the respondent's counsel on this issue and concluded 'justeru tanpa perlu melihat kepada merit permohonan plaintif, maka adalah diperintahkan permohonan plaintif di lampiran 11A dibatalkan dengan kos'. The learned High Court judge was of the view that the requirement under O 53 of the Rules of the High Court 1980 is mandatory in nature and failure to comply with it will result in the application be struck out.

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[8] Order 53 of the Rules of the High Court 1980 provides for matters relating to application for judicial review (which include for order for certiorari). The relevant provisions of O 53 are as follows:

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1(1) This order shall govern all applications seeking the relief specified in para 1 of the Sch to the Courts of Judicature Act 1964 and for the purposes therein specified.

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2(1) An application for any reliefs specified in para 1 of the Sch to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 111A.

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(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or in connected with the same subject matter.

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Order 53 governs all application's seeking the relief specified in para 1 of the schedule to the Courts of Judicature Act 1964 and for the purposes therein specified. Paragraph 1 of the said schedule stipulates, that additional powers of the High Court include powers to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo/warrantor and certiorari, or any others for the enforcement of the rights conferred by Part 11 of the constitution, or any of them or for any purpose.

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- A [9] The only reason why the learned High Court judge struck out the
appellant's application is that the appellant had failed to commence the
application by way of Form 111A as required under O 53 r 2(1) of the Rules
of the High Court 1980. From the grounds of judgment, it appears that there
is no other reason for striking out the application. The relevant part of the
B grounds of judgment is reproduced below:

- C Sehubungan dengan peruntukan-peruntukan di atas penelitian ke atas
permohonan plaintif mendapati bahawa permohonan tersebut (lampiran 11A)
dibuat melalui saman pemula, iaitu bertentangan dengan kehendak *kaedah 2(1)*
yang dinyatakan di atas, di mana permohonan untuk 'judicial review' hendaklah
dibuat mengikut bentuk dan format yang terdapat di dalam Borang 111A
Kaedah-Kaedah Mahkamah Tinggi 1980. Adalah jelas dan tidak diragui bahawa
pematuhan kepada peruntukan berkenaan adalah keperluan mandatori di mana
kegagalan mematuhi akan menyebabkan permohonan Plaintif terbatal.

- D [10] It is also pertinent to note that the application was struck out by the
learned High Court judge without having considered the merit of the
application. This is clearly admitted by the learned judge in the last paragraph
E of his grounds of judgment.

- F [11] With respect, this court (by majority decision) cannot agree with the
findings of the learned High Court judge on this issue. This court agrees with
the requirements under *O 53 of the Rules of the High Court* relating to
application of this nature, but the court cannot agree that the said
requirements are mandatory in nature as found by the learned High Court
judge. To this court, justice of the case should prevail. A person or litigant
should not be deprived of his/her day in court of law just on technical
procedural ground like in the present case. Even if the appellant had
G commenced the application by way of originating summons (not by way of
Form 111A as required under *O 53*), all the relevant facts and evidence for
considerations had been forwarded to the court. No prejudice was ever
occasioned to any party in the proceedings, including the court. To strike out
the appellant's application at this stage of the proceedings (without hearing
H the merit) is obviously unfair to the appellant who came to court to seek
justice and fair hearing.

- I [12] The above finding is in line with the provision of O 1A of the Rules
of the High Court 1980, which stresses that the court or judge shall have
regard to justice of a case. The said O 1A provides:

In administering any of the rules herein the Court or a judge shall have regard to
the justice of the particular case and not only to the technical non-compliance of
any of the rules herein.

[13] Such procedural technical objection (as in the present case) should not be allowed to obstruct the process of justice to the deserving. As we move towards the era of facilitating the process of litigation, the raising of objection on technical grounds would certainly and clearly be a thing of the past. It is clearly the intention and wisdom of the rules committee to provide for the smooth administration of the due process and administration of justice by way of substantial merits of the case and not merely on procedural technical defaults (see *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134).

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[14] A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blithered fixation on technicalities of the rules and the cold letter of the law (see *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 per Mohtar Abdullah FCJ).

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[15] Learned counsel for respondent cited the Court of Appeal's case of *Ahmad Jefri Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773; [2008] 6 CLJ 473 to support in contention that in an application of this nature (as in the present case) the appellant should have commenced the proceedings by way of an application for judicial review under O 53 of the Rules of the High Court 1980. In that case, there was an appeal against the decision of the judicial commissioner allowing the respondent's application under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 to strike out the appellant's writ and statement of claim, on the grounds that it was 'scandalous, frivolous or vexatious' or 'an abuse of the process of the court' to commence proceedings by way of a writ instead of by way of an application for judicial review under O 53 of the Rule of the High Court 1980. The only issue requiring determination in that case was whether it was an abuse of the process of the court to commence proceedings by way of a writ and statement of claim instead of filing an application for judicial review under O 53 of the Rules of the High Court 1980.

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[16] The Court of Appeal dismissed the appeal and answered the above question in the positive ie it is an abuse of the process of the court to commence the proceedings by way of a writ and statement of claim instead of filing an application for judicial review under O 53 of the Rules of the High Court 1980.

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[17] The relevant facts of that case can be distinguished from the relevant facts of the instant appeal. In that case the appellant commenced the proceedings by way of writ summons and statement of claim, instead of by way of an application for judicial review. Proceedings by way of a writ summons and statement of claim involves oral testimonies of witnesses

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- A through the process of examination-in-chief, cross-examination and re-examination; while an application for judicial review only involves evidence by affidavits.
- B [18] In the instant appeal, the appellant commenced proceedings by way of originating summons (not by way of writ summons and statement of claim) supported by affidavits evidence (the same evidence as required for an application for judicial review). The procedures and affidavit evidence involve in an originating summons and an application for judicial reviews are substantially the same. There is unlikelihood of parties being prejudiced throughout the proceedings. On this ground the court is of the view that the facts in *Ahmad Jefri's* case may be distinguished from the facts of the instant appeal and thus the ruling in that case (as cited by learned counsel for the respondent) may not be applicable to the instant appeal.
- D [19] For the above considerations, this court (by majority decision) allows the appeal with costs, subject to the case be sent back to the same High Court to hear the merit of the application. The order of the High Court is hereby set aside and deposits to be refunded.
- E *Appeal allowed with costs, subject to the case being sent back to the same High Court to be heard on its merits.*

Reported by Kohila Nesan

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